

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 23572-6-III

Respondent,

v.

MICHAEL DEAN BRINLEE,

Appellant.

Division Three

STATE OF WASHINGTON,

No. 23574-2-III

Respondent,

v.

DENNIS E. LEE JR.,

Appellant.

UNPUBLISHED OPINION

SWEENEY, C.J.—These consolidated appeals follow convictions for manufacturing drugs within 1,000 feet of a school zone. Each appellant challenges the probable cause for a search. And one challenges the timeliness of an amendment to an

information. We conclude there is no error and affirm both convictions.

FACTS

Dave Reib is the loss prevention specialist from Winco Foods in Richland, Washington. On April 18, 2004, he called Deputy Douglas Stanley of the Benton County Sheriff's Office and reported that two men had each purchased two boxes of 48 count Actifed tablets. They left together in a white Toyota truck. On April 25 one of the men returned and bought two boxes of 24 count Cold and Allergy tablets at Winco and again left in the white truck.

Again, on May 14, a man that closely resembled one of the men purchased two boxes of 96 count pseudoephedrine tablets from Winco. He returned again on May 16 at 4:40 p.m. and bought two boxes of 48 count Actifed tablets.

The three men each bought pseudoephedrine from Target in Kennewick on June 1. Two of them bought a bottle of peroxide and a bottle of Isopropyl alcohol. The loss prevention officer at Target saw the three suspects leave together in the white Toyota truck.

On June 12, at 3:30 p.m., Mr. Reib again called Deputy Stanley and reported that one of the men was at the store buying two boxes of 48 count Actifed tablets and 15 boxes of matchbooks. Matchbooks are used in the red phosphorus method of manufacturing methamphetamine. That man left in a brown four door Ford passenger

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car. Deputy Stanley arrived at the parking lot before the man left and followed him to a mobile home park at 400 14th Street, in Benton City, Washington, and specifically lot #4, where he parked the car. The lot is the site of a single wide mobile home and one small out building.

The Ford was registered to Kelly Joyce Woods. She lives at 400 14th Street lot #43. Deputy Stanley drove by this address. He saw the white Toyota truck in the driveway. Ms. Woods was married to Johnnie Doyle Lee, Dennis E. Lee Jr.'s brother. A booking photograph confirmed that Johnnie Lee was one of the men buying the cold pills.

Deputy Stanley then searched Rite-Aid's ephedra-log. It showed that on April 3, Johnnie Lee had purchased two boxes of 48 count tablets. The log showed that two minutes earlier Michael D. Brinlee bought two boxes of 48 count tablets.

Deputy Stanley obtained copies of the leases for 400 14th Street lots #4 and #43. Michael Brinlee lived at #4, and Johnnie Lee at #43. Dennis Lee stayed with his brother Johnnie at #43. These three men had also shared the same address in Stockton, California. On June 16, Deputy Stanley saw the white Toyota truck and the brown Ford at the 400 14th Street address in Benton City. On June 18, Johnnie Lee bought two boxes of 96 count pseudoephedrine tablets. He was with another man.

Deputy Stanley discussed the case with colleagues. Another officer discovered a photo from Target showing Johnnie Lee purchasing three boxes of pseudoephedrine. The

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deputy also confirmed the other suspect was Dennis Lee.

Deputy Stanley obtained a search warrant for 400 14th Street lots #4 and #43. He executed the warrant and found various items consistent with a methamphetamine lab.

The State charged Michael Brinlee and Dennis Lee with manufacture of methamphetamine. The State later amended the information to include a sentencing enhancement for being within 1,000 feet of a school zone. The court consolidated the cases for trial. Both defendants moved to suppress. They claimed the search was illegal because a copy of the warrant was not given to the residents. The court denied the motion.

A jury convicted both defendants of manufacturing methamphetamine within 1,000 feet of a school zone.

DISCUSSION

Probable Cause

Mr. Brinlee and Mr. Lee first claim the search warrant used to search their homes was not supported by probable cause.

A court may issue a search warrant only upon a showing of probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The affidavit in support of a search warrant must then set forth facts sufficient for a reasonable person to conclude that the suspect probably is involved in criminal activity and that evidence of the crime can be

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found at the place to be searched. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). We review a determination of probable cause for abuse of discretion. *State v. Anderson*, 105 Wn. App. 223, 228, 19 P.3d 1094 (2001).

Probable cause requires some nexus between the criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched. *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997). The nexus between the items to be seized and the place to be searched must be grounded in facts. *Thein*, 138 Wn.2d at 146-47. This in turn requires some showing that evidence of illegal activity will likely be found at the place to be searched. *Id.* at 147. Conclusory statements are not sufficient. *Id.* And the nexus must exist at the time the warrant is issued. *Goble*, 88 Wn. App. at 511.

Here, the State showed that three different men were buying large quantities of pseudoephedrine at about the same time and same places. Police saw them leave together. They used two specific cars. The police followed the vehicles to the residences searched. Mr. Brinlee leased lot #4 and Johnnie Lee leased lot #43. The men bought other items commonly used to manufacture methamphetamine. These men returned to specific lots (#4 and #43) after they purchased these ingredients.

Both Mr. Brinlee and Dennis Lee rely on our holding in *Thein* for the proposition that a nexus between the criminal activity and the place to be searched requires some

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showing that the contraband (here methamphetamine precursors) actually went into the place to be searched. *Thein*, 138 Wn.2d at 146-48. But our holding in *Thein* does not require that. It simply requires some nexus. *Id.* at 147. Here, the two vehicles used to transport the precursors were parked in front of the mobile homes later searched. And in one instance, police followed one car directly from the store, where the precursors were purchased, to the mobile home lot, lot #4 (Mr. Brinlee's residence). A reasonable inference, one drawn by the judge who issued the warrant, was that these precursors were going inside the mobile homes on those lots. *State v. Clark*, 143 Wn.2d 731, 748, 24 P.3d 1006 (2001) (magistrate entitled to draw reasonable inference). The showing here amply supports the conclusion of probable cause.

Ineffective Assistance of Counsel

Mr. Brinlee and Mr. Lee next contend they were denied effective assistance of counsel because defense counsel did not move to suppress the evidence on the ground that there was no probable cause to issue the warrant.

But we have addressed the propriety of the search warrant here, despite the absence of an objection in the trial court. We need not then address any failure on trial counsel's part to raise the issue.

Amended Information

Mr. Brinlee notes that the State filed its amended information adding the school

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zone enhancement after trial. And he argues the amendment then came too late and should not have been permitted. We review the trial court's grant of a motion to amend an information for abuse of discretion. *State v. Brett*, 126 Wn.2d 136, 155, 892 P.2d 29 (1995). A trial court may allow the amendment of an information at any time before the verdict as long as the "substantial rights of the defendant are not prejudiced." CrR 2.1(d). The defendant bears the burden of showing prejudice. *State v. Gutierrez*, 92 Wn. App. 343, 346, 961 P.2d 974 (1998).

It is not clear from this record when the amendment was permitted and when the defendant was arraigned on the enhanced charges. The amended information added the school zone enhancement. The clerk date stamped it November 15, 2004. This would have been after trial. However, in opening statements, the prosecutor outlined the school zone enhancement to the jury. The court also instructed the jury on the enhancement and gave a special verdict form on that topic. The school zone enhancement was then clearly part of the case from the outset. And Mr. Brinlee cannot show he was prejudiced. *State v. Pelkey*, 109 Wn.2d 484, 487-88, 745 P.2d 854 (1987) (defendant has right to know nature of charges against him).

Vehicle Search – Additional Ground for Review

Mr. Lee was not present at the mobile home when the search warrant was executed. The police found him at work, arrested him, and searched his truck. He claims

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this was error. But the truck was subject to the warrant. And Mr. Lee was the registered owner of the white Toyota truck. He had been seen buying precursor items for the manufacture of methamphetamine and used the truck for transportation when he made these purchases. The police then had probable cause to search the white Toyota truck.

We affirm the convictions.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Sweeney, C.J.

WE CONCUR:

Brown, J.

Kulik, J.